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In the Supreme Court of the United States

OCTOBER TERM, 1995

DEBRA ROWINSKY, NEXT FRIEND OF "JANE DOE" AND "JANET DOE," HER MINOR CHILDREN, ETC., PETITIONER

v.

BRYAN INDEPENDENT SCHOOL DISTRICT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a school district that receives federal financial assistance can be liable under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, when an elementary school student in the district is subjected to continual sexual harassment by other students and responsible officials of the school have notice of the harassment but fail to take appropriate corrective action.

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INTEREST OF THE UNITED STATES

This case arises out of an action filed by petitioner, Debra Rowinsky, on behalf of her minor daughters, against respondent, the Bryan Independent School District. The complaint alleges, *inter alia*, that petitioner's daughters were discriminated against on the basis of sex in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq*. Title IX prohibits discrimination on the basis of sex by recipients of federal financial assistance. 20 U.S.C. 1681. Petitioner alleges that her daughters were subjected to an unlawfully hostile environment through sexual harassment—including assaultive physical contact—by other students and that respondent, a recipient of federal financial assistance, was aware of the harassment but did not respond adequately to repeated complaints about the situation. The lower courts

ruled that, even assuming that to be true, respondent could not be held liable under Title IX because it did not take direct discriminatory action against petitioner's daughters and did not treat complaints of harassment differently based on the sex of the victim. Pet. App. A12-A21.

The United States Department of Education, Office for Civil Rights (OCR), has primary responsibility for the administrative enforcement of Title IX. See 20 U.S.C. 1682. The Department of Justice enforces Title IX in federal court in cases referred to it by OCR. OCR interprets Title IX as imposing liability on a recipient educational institution if the institution knew, or should have known, that a student was being subjected to hostile environment sexual harassment by other students and the institution failed to take appropriate corrective action. OCR has applied this interpretation in the course of its enforcement activities on numerous occasions since at least 1989, including in various Letters of Findings sent to fund recipients after investigation of complaints by OCR. Moreover, OCR interprets the statutory prohibition against race discrimination by federal fund recipients (set forth in Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, in the same statutory terms as are used in Title IX) to apply to peer racial harassment in similar circumstances and, in 1994, published a policy guidance setting forth that interpretation. On August 14, 1996, OCR issued a Title IX policy guidance regarding peer sexual harassment setting forth its long-standing interpretation.

STATEMENT

1. Petitioner Debra Rowinsky brought this action, as next friend, on behalf of her two minor daughters, Jane and

Janet Doe, who, during all relevant times, were students at Sam Rayburn Middle School, which is operated by respondent, the Bryan Independent School District. Pet. App. A2, B2. Respondent also operates the school buses that transported petitioner's daughters and other students between their homes and the school. Respondent receives federal financial assistance, *id.* at A24, and, therefore, is subject to Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, which provides, in relevant part, that

> [n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. 1681(a).

2. The courts below described much of petitioner's evidence in detail. That evidence shows that male students "physically and verbally abused" petitioner's two eighth-grade daughters on the school bus, Pet. App. B2, including swatting one of the girls on the bottom on a regular basis, *id.* at A2, B2, grabbing the girls' breasts, *id.* at A2, and reaching up the girls' skirts and grabbing their genital areas, *id.* at A3, B3. Although the girls complained to the bus driver "no fewer than eight times," he did not respond to the complaints. *Id.* at A2, B2. Repeated complaints by petitioner, her husband, and their daughters to numerous school and district officials never led to an adequate investigation or appropriate corrective action. See *id.* at A2-A5. Petitioner expands on that description, citing additional

record evidence. Pet. 2-14; see Pet. 3 n.4.[1] We rely on those statements for purposes of this brief.[2]

3. Petitioner brought this action against respondent and various school and district officials, alleging, *inter alia*, that her minor daughters had been subjected to discrimination on account of their sex, due to a hostile educational environment caused by sexual harassment, in violation of Title IX and its implementing regulations, 34 C.F.R. Pt. 106. Pet. App. A5-A6, B3-B4. Petitioner sought declaratory and injunctive relief, compensatory damages, and attorney's fees. *Id.* at A6. Petitioner contended that respondent's "insufficient action in response to Jane's and Janet's complaints of sexual harassment by the boys facilitated continuing abuse." *Id.* at B5.[3]

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[1] Petitioner cites evidence of peer sexual harassment against other students in the district that she alleges contributed to the hostile school environment, but which the decisions below did not cite. See Pet. 3 & n.4, 8-14 (*e.g.*, complaints by another middle school student that she suffered from a hostile sexual environment because of repeated sexual harassment on her school bus and inadequate response by school officials). Petitioner also cites the investigative report of the United States Department of Education's Office for Civil Rights (OCR) regarding petitioner's complaint, see note 3, *infra*, that describes additional evidence, such as interviews with other students, that corroborated the allegations by petitioner's daughters and that detailed sexually harassing conduct that had occurred elsewhere in the district.

[2] The district court correctly noted that, because it was ruling on respondent's motion for summary judgment, "[a]ll justifiable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion." Pet. App. B5, citing *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

[3] Petitioner also filed a complaint under Title IX with OCR. OCR investigated the case, recognizing it as a peer harassment case, and compiled an investigative report, pursuant to its authority under Title IX and 34 C.F.R. Pt. 106. OCR ultimately issued a letter confirming that respondent had demonstrated its willingness to resolve the serious

The district court granted respondent summary judgment on petitioner's Title IX claim. The court held that, in order to recover damages under Title IX, petitioner had to establish that respondent "intentionally discriminated" against her daughters on the basis of sex. Pet. App. B10, quoting *Doe* v. *Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1576 (1993), reconsideration granted, No. C 93-00123 CW (N.D. Cal. July 22, 1996). The court ruled that "[i]t is not enough that [respondent] knew or should have known about sexual harassment at the School or did not effectively deal with such complaints." *Ibid.* The court found that petitioner's evidence failed to show that respondent "ever adopted any resolution or took any other action formally to adopt or implement" a policy of intentional sex discrimination," *ibid.*, or that respondent "dealt *less* severely with sexual harassment and misconduct directed toward girls than it did with sexual harassment and misconduct directed toward boys," *id.* at B12.[4]

4. The court of appeals affirmed. Pet. App. A1-A42. The court held that Title IX could not impose liability on

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allegations under investigation and to develop a plan to provide training for faculty, staff, and students, and that respondent was committing itself to a written agreement of corrective action to resolve the alleged Title IX violations. See Letter from George D. Cole, Acting Regional Civil Rights Director, Dep't of Education, to Dr. Sarah Ashburn, Superintendent, Bryan Independent School District (Dec. 7, 1993).

[4] The district court dismissed the claims against the school officials in their individual capacities and petitioner did not appeal that ruling. Pet. App. A6 n.6. Thus, the school district is the only respondent. *Ibid.* The district court granted respondent summary judgment on petitioner's substantive due process claim, *id.* at B5-B9, and dismissed petitioner's procedural due process and equal protection claims as subsumed by the Title IX claim and as unsupported by evidence, *id.* at B12-B15. Petitioner did not appeal those rulings and does not raise those claims before this Court.

respondent for the alleged hostile environment caused by sexual harassment because the alleged harassers were students and there were no "allegations that the school district itself directly discriminated based on sex." *Id.* at A2.

The court of appeals viewed the issue as whether a recipient of federal financial assistance can be held liable under Title IX "for sex discrimination when the perpetrator is a party other than the grant recipient or its agents." Pet. App. A7-A8. The court read the text of Title IX as not clearly indicating whether Title IX is limited "to the acts of grant recipients." *Id.* at A10-A11. It therefore looked to the scope and structure of Title IX, its legislative history, and the Department of Education's interpretation of Title IX.

With regard to the scope and structure of Title IX, the court concluded that, "[w]hile it is plausible that the condition imposed [on recipients] could encompass ending discriminatory behavior by third parties, the more probable inference is that the condition prohibits certain behavior by the grant recipients themselves." Pet. App. A13. The court read the legislative history of Title IX to "support[] limiting the statute to the practices of grant recipients," *id.* at A14, citing the fact that "both supporters and opponents" of the legislation "focused exclusively on acts by the grant recipients," *id.* at A15.

Finally, noting that the court owed "appreciable deference" to the interpretation of Title IX by the Department of Education's Office for Civil Rights (OCR), the court concluded that OCR's interpretation "is consistent with refusing to impose liability for the acts of third parties." Pet. App. A17 & n.20. The court pointed to OCR's regulation implementing Title IX, 34 C.F.R. 106.31, which addresses only acts by recipients. Pet. App. A17. The court also pointed to an August 31, 1981, policy memo-

randum by OCR concerning sexual harassment that focused on conduct by employees or agents of recipients and that left unresolved the issue of peer sexual harassment. *Id.* at A18. The court found that it was "no coincidence" that OCR left the issue unresolved because "[s]exual harassment by third parties is beyond the jurisdiction of the OCR unless the power of the school district is somehow implicated by the third party." *Id.* at A18 n.22.

The court acknowledged, but wholly discounted, the fact that OCR treats complaints of peer harassment as within its jurisdiction, has issued Letters of Findings setting forth its interpretation of Title IX as applying to peer sexual harassment, and has also published a policy guidance interpreting the analogous ban on race discrimination in Title VI of the Civil Rights Act of 1964 to apply to hostile environments caused by peer racial harassment. Pet. App. A19, citing 59 Fed. Reg. 11,448, 11,449 (1994). See also *id.* at A19-A20. The court concluded that a school district could be liable in a case of peer sexual harassment only if the school district "responded to sexual harassment claims differently based on sex." *Id.* at A21.[5] Because petitioner failed to allege facts to support such a claim, the court affirmed the district court's judgment.

Judge Dennis dissented, in relevant part. Pet. App. A22-A42. He relied on the Court's opinions in *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), and *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986),

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[5] The court disapproved of incorporating the concept of hostile environment sexual harassment from Title VII of the Civil Rights Act of 1964 into a case of peer harassment under Title IX. The court pointed to the lack of an agency relationship between the school and the harasser and to its view that there is not a "power relationship" between the harasser and the victim, so that "[u]nwanted sexual advances of fellow students do not carry the same coercive effect or abuse of power as those made by a teacher, employer or co-worker." Pet. App. A8 n.11.

to conclude that "a student subjected to severe sexual harassment by other students in the school environment may recover for damages sustained thereby from a federally funded educational institution if its board had knowledge of the harassment and failed to take appropriate corrective action." Pet. App. A32.

ARGUMENT

The court of appeals' ruling places virtually all claims of an unlawful hostile environment based on student-on-student sexual harassment beyond the reach of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq*. Such categorical exclusion of those cases cannot be squared with the text or purpose of Title IX. Although there will continue to be issues to resolve on a case-by-case basis (*e.g.*, whether the harassment is severe or pervasive enough to constitute a hostile environment; whether the school district was on notice of the harassment), the Court should grant review in this case to reverse the lower court ruling that would completely preclude all such claims, regardless of the severity or pervasiveness of the alleged conduct or the school district's ability to respond to it.

The court of appeals misinterpreted Title IX when it held that a school district that receives federal financial assistance cannot be held liable under Title IX for its failure to remedy a hostile educational environment caused by pervasive sexual harassment of students by other students, despite the fact that the district knew about the harassment and failed to take adequate corrective action. Its decision conflicts with decisions of other lower federal courts and is contrary to the policy and enforcement practices of the United States Department of Education's Office for Civil Rights (OCR), which has primary responsibility for enforcing Title IX. 20 U.S.C. 1682.

The major flaw in the court of appeals' reasoning is its view that to hold a school district liable in this type of case would be to hold it liable for the conduct of students who are not its agents. Imposing liability, under Title IX, on an educational institution that fails to act, despite its knowledge of severe or pervasive sexual harassment of students by other students, does not impose liability on that school for the student's actions. Rather, the institution is liable for its *own* conduct in knowingly allowing a discriminatory environment to continue, and thus failing to fulfill its duty to protect sexually harassed students from being "subjected to discrimination under" (20 U.S.C. 1681(a)) the school district's educational system. Allowing such sexual harassment to continue alters the conditions of the victim's education, on account of her sex, and may impede the student's ability to participate in, or benefit from, the school district's educational system.

If left unreviewed, the court of appeals' decision will directly impede the efforts of OCR to enforce Title IX in the Fifth Circuit and will create doubt nationwide about the correctness of OCR's interpretation of Title IX's prohibition of sex discrimination in education. Such discrimination may have especially profound consequences. As a panel of the Eleventh Circuit has recently stated, "[t]he damage caused by sexual harassment * * * is arguably greater in the classroom than in the workplace, because the harassment has a greater and longer lasting impact on its young victims, and institutionalizes sexual harassment as accepted behavior. Moreover, as economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school." *Davis* v. *Monroe County Bd. of Educ.*, 74 F.3d 1186, 1193 (1996), vacated on grant of rehearing en banc, No. 94-9121, 1996 WL 438188 (Aug. 1, 1996).

1. a. The court of appeals' ruling is inconsistent with this Court's decisions regarding liability under Title IX and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court reversed the dismissal of a case in which a plaintiff sought damages based on her allegations that her school district violated Title IX's prohibition against sex discrimination. Plaintiff alleged that she was subjected to continual sexual harassment by a teacher at school, that the district knew of the harassment, and that the district took no action to stop it. *Id.* at 63-64. The Court ruled that the case should not have been dismissed because a damages remedy is available in such an action to enforce Title IX. The Court thereby recognized that the implied cause of action against a fund recipient for damages under Title IX includes actions based on allegations of hostile environment sexual harassment at school. *Id.* at 76.

The *Franklin* Court relied on *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), a Title VII case in which the Court held that a supervisor discriminated on the basis of sex when he created a hostile environment for a subordinate at work by sexually harassing her. *Vinson* explained that "hostile environment" cases under Title VII are rooted in the fact that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id.* at 65, citing EEOC Guidelines, 45 Fed. Reg. 74,676 (1980). For sexual harassment to be actionable under Title VII, the harassment must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" 477 U.S. at 67, quoting *Henson* v. *City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982). Such a racially or sexually hostile environment is an "arbitrary barrier to sexual equality at the

workplace," *id.* at 66-67, quoting *Henson*, 682 F.2d at 902. *Id.* at 66; see also *Harris* v. *Forklift Systems, Inc.*, 114 S. Ct. 367, 370 (1993) (reaffirming *Vinson*'s holding that the prohibition on unlawful disparate treatment in employment precludes "requiring people to work in a discriminatorily hostile or abusive environment").

By applying the Title VII hostile environment principle in a Title IX case, the *Franklin* Court recognized that Title IX affords students a right to attend school in an environment free from discriminatory intimidation, ridicule and insult based on sex. Sexual harassment that is sufficiently severe or pervasive to alter the conditions of a victim's employment and create an abusive working environment is actionable under Title VII. Similarly, sexual harassment that is sufficiently severe or pervasive to affect a student's ability to participate in, to benefit from, or to be free of discrimination under a school district's educational system is actionable under Title IX. Sexual harassment that creates a hostile school environment for members of one sex is an "arbitrary barrier to sexual equality" in the school.

b. When a student is subjected to a hostile educational environment caused by pervasive sexual harassment, she suffers from discrimination based on sex regardless of whether the harasser is a teacher or a fellow student. It is just as true in the school context as it is in employment that an environment "heavily polluted with discrimination" may "destroy completely the emotional and psychological stability" of the targeted victims. See *Vinson*, 477 U.S. at 66, quoting *Rogers* v. *EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (discussing a racially hostile work environment), cert. denied, 406 U.S. 957 (1972). A discriminatorily abusive school environment, "even one that does not seriously affect [students'] psychological well-being, can and often will detract from [students' school] performance,

discourage [students] from remaining [in school programs or activities], or keep them from advancing in their [school] careers." *Harris*, 114 S. Ct. at 370-371 (making those observations in context of the workplace). "[E]ven without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a [school] environment abusive to [students] because of their * * * gender" offends Title IX's broad rule of educational equality. *Id.* at 371.

Imposition of Title IX liability on school districts that know of such discrimination and do not respond to stop it is consistent with *Franklin*. In that case, the plaintiff had alleged that, "though they became aware of and investigated [the teacher's] sexual harassment of [the plaintiff] and other female students, teachers and administrators took no action to halt it and discouraged [the plaintiff] from pressing charges." 503 U.S. at 63-64. In at least one other case, the Court has proceeded on the assumption that liability for damages due to sexual harassment can be imposed on an entity that knowingly permits sexual harassment by a third party to take place on its premises. In *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483 (1994), the Court assumed that the case presented a valid Title VII claim for damages against an employer based on the employer's having inadequately responded to complaints from one employee that another employee (not her supervisor) had sexually harassed her at work. *Id.* at 1489. Employer liability in *Landgraf* was based on the theory that an employer has a duty, under Title VII, to take what measures it reasonably can to stop harassment at work by persons over whom the employer exercises some control. See *Harris*, 114 S. Ct. at 372 (Scalia, J., concurring) (describing Title IX hostile environment cases as requiring a determination whether "sex-related conduct engaged in

(*or permitted by*) an employer is egregious enough to warrant an award of damages") (emphasis added).

2. The court of appeals below erroneously ruled that the Title VII principle that defines discrimination to include hostile environment sexual harassment should not be employed in situations involving student-on-student harassment under Title IX. Pet. App. A9 n.11. This decision conflicts with the weight of authority in the lower courts. The court below acknowledged that the Eleventh Circuit had reached the opposite conclusion in *Davis* v. *Monroe County Board of Education*, 74 F.3d 1186 (1996).[6] See Pet. App. A7 n.8. In *Davis*, the court held that

> when an educational institution knowingly fails to take action to remedy a hostile environment caused by a student's sexual harassment of another, the harassed student has "be[en] denied the benefits of, or be[en] subjected to discrimination under" that educational program in violation of Title IX, 20 U.S.C. § 1681(a). Just as a working woman should not be required to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living," *Meritor*, 477 U.S. at 67, * * * a female student should not be required to run a gauntlet of sexual abuse in return for the privilege of being allowed to obtain an education.

74 F.3d at 1194. The *Davis* court looked to the principles applied in Title VII cases involving sexual harassment by a co-worker, and held that an educational institution would

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[6] In dissent below, Judge Dennis expressly agreed with the analysis of the *Davis* panel. Pet. App. A22 n.1. After the decision below, the Eleventh Circuit vacated the panel opinion in *Davis* and granted rehearing en banc. No. 94-9121, 1996 WL 438188 (Aug. 1, 1996).

be liable for a hostile environment created by students if the institution "knew or should have known of the harassment in question and failed to take prompt remedial action." *Id.* at 1195, quoting *Henson*, 682 F.2d at 905 (applying same in Title VII case). A school's liability in such a case is not because of the direct acts of its officials, but because of their "failure to take action to stop the offensive acts of those over whom the officials exercised control." *Id.* at 1193.[7]

The court below also acknowledged that its view conflicts with the reasoning implicit in opinions of other circuits. Pet. App. A7 n.8. The Second Circuit has recognized, for example, that, "in a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII." *Murray* v. *New York Univ. College of Dentistry*, 57 F.3d 243, 249 (1995) (interpreting *Franklin*). The *Murray* court borrowed from Title VII standards and concluded that the institution would be liable for sexual harassment of a student by a patient if the institution "either provided

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[7] The courts of appeals rely on a similar theory of liability in cases under Title VII where employers are held liable for a hostile work environment created by harassment of a worker by a co-worker—it is the employer's failure to remedy the hostile environment that renders it liable. See, *e.g.*, *Ellison* v. *Brady*, 924 F.2d 872, 881-882 (9th Cir. 1991); *Hall* v. *Gus Construction Co.*, 842 F.2d 1010 (8th Cir. 1988); *Hunter* v. *Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986); *Snell* v. *Suffolk County*, 782 F.2d 1094 (2d Cir. 1986). See also NOW Legal Defense and Education Fund *et al.* Amicus Br. 11 & n.7, 12 & n.8 and cases cited therein (collecting cases regarding employer liability for failing to remedy a hostile work environment where it was created by non-supervisory employees or third parties such as customers); *Davis*, 74 F.3d at 1193 n.6 (collecting cases to the same effect).

no reasonable avenue for complaint or knew of the harassment but did nothing about it." *Ibid.* (citation omitted). Similarly, in *Lipsett* v. *University of Puerto Rico*, 864 F.2d 881 (1988), the First Circuit reviewed a "mixed employment-training" (*id.* at 897) case that was brought under Title IX, and relied on Title VII principles to hold that, where harassment by fellow residents in a surgery training program creates a hostile environment, the educational institution is liable under Title IX if "an official representing the institution knew, or in the exercise of reasonable care, should have known, of the harassment's occurrence, *unless* that official can show that he or she took appropriate steps to halt it." *Id.* at 901. See also *Brown* v. *Hot, Sexy & Safer Productions, Inc.*, 68 F.3d 525, 529 (1st Cir. 1995), cert. denied, 116 S. Ct. 1044 (1996).[8]

Numerous district courts have expressly recognized that educational institutions may be held liable under

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[8] Other courts of appeals have also indicated that they would hold that Title IX imposes liability on educational institutions that fail to respond appropriately to known hostile environments caused by peer sexual harassment. See *Doe* v. *Petaluma City Sch. Dist.*, 54 F.3d 1447, 1452 (9th Cir. 1995) (granting a school official qualified immunity against a Title IX peer sexual harassment claim because, in the court's view, it was not clearly established prior to the Court's opinion in *Franklin* that a school counselor had a duty to prevent peer sexual harassment, but expressly stating that, if the official "engaged in the same conduct today, he might not be entitled to qualified immunity"); *Clyde K.* v. *Puyallup Sch. Dist.*, 35 F.3d 1396, 1401 (9th Cir. 1994) ("school officials might reasonably be concerned about liability for failing to remedy peer sexual harassment that exposes female students to a hostile educational environment"); cf. *Seamons* v. *Snow*, 84 F.3d 1226 (10th Cir. 1996) (testing the sufficiency of a peer sexual harassment Title IX claim by application of the five-step proof standard set forth in *Davis*).

Title IX for a hostile environment caused by students. These cases have frequently based decision on application of Title VII principles.[9] For example, in *Bosley* v. *Kearney R-1 School District*, 904 F. Supp. 1006, 1022 (W.D. Mo. 1995), the district court, utilizing principles developed under Title VII, held that a recipient educational institution could be liable under Title IX for hostile environment sexual harassment created by student harassers if the institution knew of the harassment and intentionally failed to take proper remedial action. *Id.* at 1023. In *Oona R.-S.* v. *Santa Rosa City Schools*, 890 F. Supp. 1452, 1466-1470 (N.D. Cal. 1995), the court analyzed whether the plaintiff had alleged a deprivation of rights under Title IX that was actionable against a state actor under 42 U.S.C. 1983. The court concluded that the plaintiff had stated such a claim because

> the right created by Title IX may be violated when female students are subjected to sexual harassment by their male peers at school and school officials discriminate against the female students on the basis of sex in encouraging or failing to appropriately respond to such harassment. Such discrimination may manifest itself in the active encouragement of peer harassment, the toleration of the harassing behavior of male

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[9] In a pre-*Franklin* decision involving alleged harassment by a teacher, one district court held that Title IX did not apply to cases of hostile environment sexual harassment. *Bougher* v. *University of Pittsburgh*, 713 F. Supp. 139, 145 (W.D. Pa.), aff'd on other grounds, 882 F.2d 74 (3d Cir. 1989). In affirming, the Third Circuit expressly declined to decide the question of Title IX's applicability. 882 F.2d at 77. A district court in the Fifth Circuit has held, post-*Franklin*, that a student cannot bring a hostile environment claim under Title IX. *Garza* v. *Galena Park Indep. Sch. Dist.*, 914 F. Supp. 1437, 1438 (S.D. Tex. 1994).

> students, or the failure to take adequate steps to deter or punish peer harassment.

890 F. Supp. at 1469, citing *Doe*, 830 F. Supp. at 1575-1576. See also *Mennone* v. *Gordon*, 889 F. Supp. 53, 55, 58 (D. Conn. 1995) (stating that school board was appropriate defendant in a Title IX case alleging peer sexual harassment about which school officials knew, but did nothing); cf. *Moire* v. *Temple Univ. Sch. of Medicine*, 613 F. Supp. 1360, 1366-1370 (E.D. Pa. 1985) (recognizing that Title IX would be violated if university officials sanctioned a harassing environment based on sex), aff'd, 800 F.2d 1136 (3d Cir. 1986) (Table).

One recent district court expressly declined to follow the court of appeals' ruling in the instant case, stressing the flaws underlying its analysis. *Doe* v. *Petaluma City School District*, No. C 93-00123 CW (N.D. Cal. July 22, 1996) (on grant of reconsideration motion):[10]

> *Rowinsky* is manifestly based on a fundamental misunderstanding of the nature of this type of claim. The majority opinion continually refers to the plaintiff's claim as being based on the conduct of the peer harassers rather than on the action and inaction of the school district, and its reasoning is based upon this characterization. * * *
>
> The actual thrust of this type of claim, is to impose liability on the school district based not on the harassing conduct of its students, but on the district's *own* conduct of knowingly permitting the discriminatory

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[10] The courts below relied on the earlier opinion of the *Petaluma* court, see 830 F. Supp. 1560, 1576 (1993), that was subsequently vacated on grant of a reconsideration motion (July 22, 1996).

> hostile and abusive environment to continue and to inflict an ongoing injury on its female students.

Slip op. 13. The court concluded that the Title IX recipient would be liable for failing to take appropriate remedial action in response to student-on-student sexual harassment that caused a hostile educational environment where the recipient "actually knew, or should in the exercise of its legal duties have known, of the harassment." *Id.* at 26-27. See also *Burrow* v. *Postville Community Sch. Dist.*, No. C94-1031, 1996 WL 361126, at *8-*9 (N.D. Iowa June 17, 1996) (rejecting *Rowinsky* and holding that student may bring a Title IX action for damages against a school district "for its knowing failure to take appropriate remedial action in response to the hostile sexual environment created by students").

3. The ruling below is inconsistent with the interpretation and enforcement practices of OCR. The court of appeals rejected the interpretation of Title IX that OCR has applied in its enforcement practices, as evidenced by its Letters of Findings to recipients in particular cases. Pet. App. A19. In 1989, OCR found a school district to be in violation of Title IX based on its failure to stop peer sexual harassment, stating that "[h]arassment of a student because of his or her sex may have the effect of depriving that student of benefits of or subjecting them to different treatment on the basis of sex. * * * A district which is aware that its students are being subjected to sexual harassment has a duty under Title IX to take prompt and effective action to stop it." Letter from John E. Palomino, Regional Civil Rights Director, Dep't of Education, to Charles Cadman, Superintendent, Petaluma City School District 3 (May 5, 1989). OCR repeated this interpretation in several subsequent Letters of Findings and stated in 1992 that, "[w]hen individuals who are partic-

ipating in a program or activity operated or sponsored by an educational institution are subjected to sexual harassment, they are receiving treatment that is different from others. * * * If the harassment is carried out by non-agent students, the institution may * * * be found in non-compliance with Title IX if it failed to respond adequately to actual or constructive notice of the harassment." Letter from John E. Palomino, Regional Civil Rights Director, Dep't of Education, to Dr. John Maguire, President, The Claremont Graduate School 2 (July 24, 1992). On August 14, 1996, OCR issued a draft agency guidance setting forth the standards it applies when investigating peer sexual harassment claims. OCR is publishing a notice to invite comments concerning the clarity and completeness of this guidance. (Copies of that guidance, as well as the cited Letters of Findings, have been lodged with the Court and served on the parties.)[11] OCR's final policy guidance should merit deference by the Court. See *Smiley* v. *Citibank (South Dakota)*, 116 S. Ct. 1730 (1996).

OCR's interpretation is consistent with its interpretation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq*. Title VI prohibits discrimination by federal

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[11] Contrary to the suggestion of the court of appeals (Pet. App. A17-A18), OCR's general regulation implementing Title IX (34 C.F.R. 106.31) and its earlier policy memorandum regarding sexual harassment (see Memorandum from Director of Litigation, Enforcement, and Policy Service (Aug. 31, 1981)) do not foreclose OCR from developing an enforcement policy or issuing a guidance, under Title IX, on peer sexual harassment. The initial regulation's general prohibition against sex discrimination does apply to hostile environment sexual harassment, it simply does not use those terms, and the 1981 policy memorandum left open the issue of peer sexual harassment under Title IX, without expressing any views on the appropriateness of imposing liability on recipients in any particular circumstances.

fund recipients (including educational institutions) on the basis of race, using the same statutory terms used in Title IX.[12] In 1994, OCR issued a policy guidance, 59 Fed. Reg. 11,448-11,454, stating that a recipient "has subjected an individual to different treatment on the basis of race" in violation of Title VI "if it has effectively caused, encouraged, accepted, tolerated or failed to correct a racially hostile environment of which it has actual or constructive notice." *Id.* at 11,449. OCR further explained that, "[u]nder this analysis, an alleged harasser need not be an agent or employee of the recipient, because this theory of liability under title VI is premised on a recipient's general duty to provide a nondiscriminatory educational environment." *Ibid.* This is the same liability theory that OCR has applied under Title IX and that is set forth in its draft peer sexual harassment guidance.

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[12] Title VI states, in relevant part:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. 2000d.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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